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IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, et al.,

Petitioners,

v.

GEORGE W. BUSH, et al.,

Respondents.

KHALED A.F. AL ODAH, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR AMICI CURIAE COALITION OF NON-GOVERNMENTAL ORGANIZATIONS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici are public interest organizations with differing—often widely differing—political and ideological perspectives.[1] But amici are unified on one issue. They believe that the checks and balances fundamental to our government of divided powers require that an independent Judiciary meaningfully determine the lawfulness of the Executive's detentions at Guantánamo Bay, an area subject to the exclusive authority of the United States and far removed from any actual battlefield.

Amicus the **Constitution Project** is an independent think tank that brings together legal and policy experts from across the political spectrum to promote consensus solutions to pressing constitutional issues. In March 2007, the Project issued a *Statement on Restoring Habeas Corpus Rights Eliminated by the Military Commissions Act*. The bipartisan group of signers stated that, while there is a need to detain foreign terrorists to protect national security, "we do not believe repealing federal court jurisdiction over habeas corpus serves that goal. On the contrary, habeas corpus is crucial to ensure that the government's detention power is exercised wisely, lawfully, and consistently with American values."[2]

Amicus **Human Rights First** ("HRF") is a non-profit, non-partisan organization that has worked since 1978 to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. HRF supports human rights activists around the world, protects refugees in flight

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae or their counsel, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of the parties, whose letters of consent have been filed with the Clerk.

[2] Statement available at www.constitutionproject.org/pdf/MCA_Statement.pdf. A list of the signatories to this statement is included in the addendum to this brief.

from persecution and repression, and helps build an international system of justice and accountability for human rights crimes. HRF works to advance effective counterterrorism laws and policies that are consistent with U.S. and international law through advocacy in the courts and with policymakers, research and reporting, and trial monitoring.

Amicus **Human Rights Watch** ("HRW") is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, HRW seeks to bring public pressure upon offending governments and others to end abusive practices. For the past six years, HRW has worked extensively to document U.S. counterterrorism policies and practices and to promote effective and lawful responses to terrorist threats.

Amicus the **Rutherford Institute** is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated. Attorneys affiliated with the Institute have represented numerous parties before the U.S. Supreme Court. The Institute has also filed briefs as an amicus of the Court in cases dealing with critical constitutional issues. The Rutherford Institute is a staunch advocate of the Great Writ of habeas corpus.

Amicus the **American-Arab Anti-Discrimination Committee** ("ADC") is a non-sectarian, non-partisan, national grassroots and civil rights organization dedicated to defending the rights of people of Arab descent and promoting their rich cultural heritage. It was founded in 1980 by former U.S. Senator James Abourezk, has 38 chapters nationwide, and members in all 50 States. ADC is at the forefront in addressing discrimination and bias against Arab Americans

wherever it is practiced, and is committed to eradicating all forms of unlawful discrimination. ADC strives to preserve the constitutional guarantees of Due Process and Equal Protection, which form the key foundation of our nation.

Amicus the **American Freedom Agenda** is an organization dedicated to upholding the United States and 50 state constitutions and to restoring checks and balances among the three branches of government against the accumulation of power by any branch of the government. It promotes social welfare by educating the public on: (a) the nature and kind of inalienable rights secured by United States and state constitutions, and (b) the threats, abuses, denials, and dilutions of such rights.

Amicus the **American Jewish Committee** ("AJC"), a national organization of over 175,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews. It is the conviction of AJC that those rights will be secure only when the civil and religious rights of all Americans are also secure. Long before the tragic events of September 11, 2001, AJC advocated positions that give due deference to both this country's national security needs and our constitutionally guaranteed civil liberties and principles of due process of law. AJC believes that respecting both of these important interests requires preserving the "great writ" of habeas corpus and ensuring meaningful judicial review of executive detention.

Amicus the **Anti-Defamation League** ("ADL") was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all citizens alike. To that end, ADL speaks as both an advocate for civil rights and liberties and as an aggressive supporter of law enforcement and the government's important efforts to fight international terrorism. ADL believes that judicial review is fundamental to the success of these efforts.

Amicus the **Jewish Council for Public Affairs** ("JCPA"), the coordinating body of 14 national and 125 local Jewish federations and community relations councils, was founded in 1944 to safeguard the rights of Jews throughout the world and to protect, preserve, and promote a just society. The JCPA recognizes that the Jewish community has a direct stake and an ethical imperative to assure that America remains a country wedded to the Bill of Rights and committed to the rule of law, and a nation whose institutions continue to function as a public trust.

Amicus the **Muslim Public Affairs Council** ("MPAC") is a public service agency working for the civil rights of American Muslims and for the integration of Islam into American pluralism. MPAC was created in 1988 to promote a vibrant American Muslim community and over the past two decades, MPAC has built a reputation as a consistent and reliable resource for government and media, and is trusted by American Muslims as an authentic, experienced voice. Today, MPAC sits as the most politically integrated American Muslim institution in Washington, D.C. and serves as the primary interface between the community and the U.S. Government.

Amicus the **National Association of Criminal Defense Lawyers** ("NACDL") is a non-profit corporation with more than 12,000 members, including military defense counsel, public defenders, private practitioners and law professors, as well as affiliates totaling more than 40,000 lawyers. The NACDL was founded in 1958 to disseminate and advance knowledge of the law in the area of criminal practice and to encourage the integrity, independence and expertise of defense lawyers in criminal cases, both civilian and military. Among the NACDL's objectives are promoting the proper and fair administration of criminal justice (including military justice and habeas review) and preserving, protecting and defending the adversary system and the U.S. Constitution.

Amicus the **National Association of Social Workers** ("NASW") is the largest association of professional social

workers in the world with 145,000 members and chapters throughout the United States, in Puerto Rico, Guam, the Virgin Islands, and an International Chapter in Europe. NASW supports the adoption of human rights as a foundation principle upon which all of social work theory and applied knowledge rests, including the right not to be arbitrarily detained and the right to a fair and public hearing by an independent and impartial tribunal in the determination of an individual's rights and obligations and of any criminal cha.ge against him, as specified in the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights.

Amicus the **National Council of the Churches of Christ in the U.S.A.** ("NCC"), founded in 1950, is the leading force for ecumenical cooperation in the United States. The NCC's 35 Anglican, Orthodox and Protestant member communions include 45 million persons in 100,000 congregations in all 50 states. The NCC, as a religious organization, is interested from a moral standpoint in the right to due process, which is being denied the detainees in Guantánamo.

Amicus **Open Society Institute** ("OSI") is a private operating and grantmaking foundation created in 1993 to build vibrant and tolerant democracies whose governments are accountable to their citizens. By supporting open societies globally, OSI seeks to shape public policies that assure greater fairness in political, legal, and economic systems and safeguard fundamental rights. OSI works to implement and promote a range of initiatives to advance justice, education, public health, and independent media.

Amicus **Patriots to Restore Checks and Balances** ("PRCB") is an alliance of individuals and organizations, from across the ideological spectrum, that believes the threat of terrorism cannot be allowed to diminish or dissolve the carefully constructed civil liberties that underlie our society and are guaranteed in the Constitution and Bill of Rights. In furtherance of this underlying concern, PRCB works in many forums—government and private—and on many civil liber-

ties issues, including habeas corpus. PRCB is thus interested in preserving the writ of habeas corpus in the context of so-called military tribunals such as created by the MCA.

Amicus **People For the American Way Foundation** ("People For") is a non-partisan citizens' organization established in 1980 to promote and protect civil and constitutional rights that now has more than 1 million members and supporters nationwide. People For educates the public on our tradition of liberty and freedom and defends that tradition, including the fundamental right to challenge the legality of one's detention, through litigation and other means. Accordingly, People For has filed amicus briefs in other such cases before this Court, including *Rasul* v. *Bush* and *Hamdan* v. *Rumsfeld*. People For joins this brief to help vindicate the critical right to habeas corpus at issue in this case.

Amicus the **Union for Reform Judaism** ("URJ") encompasses 1.5 million Reform Jews in 900 North American congregations. As we strive to strike the appropriate balance between cherished, constitutionally protected freedoms and national security, we turn to Jewish law for guidance, which affirms the spark of the divine in every individual and mandates the just treatment of strangers among us. The URJ is opposed to indefinite detention and administrative rulings that designate individuals as "enemy combatants" and thus not entitled to the full range of due process rights. No matter how heinous the crime, every individual should have access to the legal system under which they are being held.

SUMMARY OF THE ARGUMENT

The Government broadly contends that Congress may grant the Executive almost unchecked authority to imprison people it labels as "enemy combatants" without ever charging them with (or presenting evidence of) offenses and without allowing any court to conduct an independent inquiry into the legality of their detentions. Petitioners, on the other hand, ask only that the Court enforce the structural guarantee of the Suspension Clause that an independent court be allowed to

make a meaningful determination of the legality of Executive detention, except in those extraordinary circumstances where Congress has lawfully suspended habeas corpus. Petitioners do not ask this Court to determine whether they have been lawfully imprisoned; they merely ask that they be allowed to seek federal court review of the legality of their detention in habeas proceedings required by the Constitution.

These cases turn on the structural requirement of separation of powers central to our form of government. The Suspension Clause is an integral component of that system of checks and balances, checking the powers of both Congress and the Executive, and balancing them with the coequal authority of an independent Judiciary. The Suspension Clause ensures that, in cases of imprisonment, an independent Judiciary will be able to determine whether the Executive has the requisite lawful basis for that detention. It also expressly limits Congress's ability to preclude the Judiciary from assessing the legality of Executive detention. Of specific relevance to this case, the Suspension Clause ensures that neither Congress nor the Executive can create "law-free" zones within the exclusive jurisdiction of the United States where the Judiciary cannot independently inquire into the legality of Executive detention. The Executive otherwise would have free rein to imprison individuals indefinitely, safe in the knowledge that no court could conduct a meaningful inquiry into the factual or legal bases for those imprisonments.

The few facts that are known about the Guantánamo Bay detainees demonstrate the grave dangers of allowing Congress to eliminate the ability of the independent Judiciary to issue writs of habeas corpus. The Executive has imprisoned individuals based on the uncorroborated hearsay of self-interested bounty hunters; it has continued to hold the vast majority of its detainees indefinitely based on the most perfunctory of reviews; and it has not allowed the detainees any meaningful opportunity to clear their names. Such Kafkaesque regimes may lawfully exist in other countries where executive power is absolute. But the Framers of our

Constitution expressly ensured that habeas corpus would be available to permit the Judiciary to check absolute Executive power except in the extraordinarily limited and precisely defined circumstances of a rebellion or invasion.

ARGUMENT

Separation of powers principles compel the conclusion that the habeas-stripping provision of the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, is an unconstitutional exercise of Congressional power. The MCA attempts to prevent the Judiciary from carrying out its most basic and essential function—interpreting and applying the rule of law through the writ of habeas corpus. Simply put, "[t]he accumulation of all powers legislative, executive and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist No. 47* (Madison).

I. HABEAS ENSURES SEPARATION OF POWERS BY PROVIDING AN IRREDUCIBLE CHECK BY AN INDEPENDENT JUDICIARY AGAINST UNLAWFUL EXECUTIVE DETENTION.

A. The Suspension Clause Is A Vital Guarantee Of Separation Of Powers That Is Fully Enforceable Here.

"[T]he central judgment of the Framers of the Constitution [was] that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta* v. *United States*, 488 U.S. 361, 380 (1989). No provision of the Constitution more succinctly embodies this tripartite separation of powers than the Suspension Clause, which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. The Clause ensures that an independent Judiciary will serve as a check on unlawful Executive detention without interference

from the Legislature except in the narrowly defined and time-limited circumstances of a rebellion or invasion.

The Suspension Clause thus guarantees that the federal courts have broad authority to inquire into the legality of Executive detentions. It implicitly recognizes that the courts are constitutionally empowered to issue the writ of habeas corpus as "an incident of judicial power." *McNally* v. *Hill*, 293 U.S. 131, 135 (1934). In the Judiciary Act of 1789, "a contemporaneous exposition of the Constitution," *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 420 (1821) (Marshall, C.J.), Congress gave "this great constitutional privilege * * * life and activity," *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807), by empowering all federal courts to issue the writ in cases of detention "under or by colour of the authority of the United States." Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82. Thus, "[a]cting under the immediate influence of [the Suspension Clause]," *Bollman*, 8 U.S. (4 Cranch) at 95, the First Congress specified that the federal courts had the power to issue the writ to all "prisoners held in custody of the United States." *Stone* v. *Powell*, 428 U.S. 465, 474-75 (1976).

This Court consistently has recognized the breadth of the federal courts' power to review Executive detention. "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest." *INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001); *see Brown* v. *Allen*, 344 U.S. 443, 533 (1953) ("historic purpose of the writ has been to relieve detention by executive authorities without judicial trial") (Jackson, J. concurring). "[T]his Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace." *Rasul* v. *Bush*, 542 U.S. 466, 474 (2004); *see In re Yamashita*, 327 U.S. 1 (1946) (entertaining petition challenging wartime detention in the Philippines); *Ex parte Quirin*, 317 U.S. 1 (1942) (entertaining petition of enemy aliens convicted of war crimes); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)

(entertaining petition of man who plotted attack on military installations). Thus, the Great Writ "allows the Judicial Branch to play a necessary role in maintaining [the] delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality).

The Suspension Clause expressly prohibits the Legislature from eliminating the Judiciary's role in reviewing Executive detention except in cases of rebellion or invasion. The structural importance of the Suspension Clause in this regard cannot be overstated. It is the *only* provision of the Constitution that *expressly* constrains Congress's ability to abrogate the powers of an independent Judiciary. The Constitution contains other indirect and implicit restraints (*i.e.*, requiring judicial life tenure and the existence of this Court), but it contains no other provision that expressly guarantees judicial power against legislative overreaching.

The history of habeas corpus confirms that the prohibition against its suspension is a structural guarantee against Executive lawlessness. Habeas traces to the Magna Carta, but the modern writ was born in the 17th-century power struggle in England between the Crown and an increasingly independent Parliament. In 1628, Parliament presented a Petition of Right to Charles I, complaining that individuals had been

> imprisoned without any cause showed; and when for their deliverance they were brought before your justices by your Majesty's writs of habeas corpus * * * and their keepers commanded to certify the causes of their detainer, no cause was certified, but that they were detained by your Majesty's special command, signified by the lords of your Privy Council, and yet were returned back to several prisons, without being charged with anything to which they might make answer according to the law.

Petition of Right, 1628, 3 Car. I, c.1. It was soon thereafter, in the Habeas Corpus Act of 1679, 31 Car. II, c. 2, that Parliament ended the practice of unaccountable detention.

The Framers were well aware of this relatively recent history when they enshrined the Great Writ in our own Constitution. *See Hamdi*, 542 U.S. at 555 (Scalia, J., dissenting). The writ, as recognized in the Constitution, serves the same structural function here as it did in England—ensuring that the Executive will not be a law unto itself, free from meaningful judicial inquiry into the legality of detentions. The Suspension Clause, however, more broadly governs the allocation of powers, preserving judicial independence against attempts by Congress or the Executive to abrogate it.

The D.C. Circuit did not appreciate the Suspension Clause's structural function and concluded that this case turns on whether the Constitution "confer[s] rights on aliens without property or presence within the United States." *Boumediene* v. *Bush*, 476 F.3d 981, 991 (D.C. Cir. 2007). That structural function, however, has important consequences for these cases. Petitioners should prevail regardless of whether they have constitutional rights because, as shown below, the MCA violates separation of powers principles. The Court must "disregard" such a statute.[3] Thus, the Court should ignore the MCA's habeas-stripping provision and hold that district courts have jurisdiction over the detainees' habeas petitions under preexisting authority.[4] Because the MCA is unconstitutional, this case is governed by *Rasul*, which held

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[3] *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995) (affirming refusal to reinstate judgment based on statute that violated separation of powers) (citing *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

[4] *See United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 147-48 (1872) (disregarding statute that purported to remove federal court jurisdiction in violation of separation of powers); Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1387 (1953) ("If the court finds that what is being done is invalid, its duty is simply to declare the jurisdictional limitation invalid also, and then proceed under the general grant of jurisdiction.").

that courts have jurisdiction to consider habeas petitions by foreigners detained at Guantánamo. 542 U.S. at 470.

B. Congress May Not Eliminate Habeas Review In Areas Subject To Exclusive U.S. Authority Without Complying With The Suspension Clause.

1. Separation Of Powers Prohibits "Law Free" Zones In Areas Of Exclusive U.S. Authority.

These cases present the exact threat to separation of powers the Suspension Clause seeks to prevent. As Justice Kennedy has noted in the related context of military commissions:

> Trial by military commission raises separation-of-powers concerns of the highest order. Located within a single branch, these courts carry the risk that offenses will be def[illegible]d, prosecuted, and adjudicated by executive officials without independent review. Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid.

Hamdan v. *Rumsfeld*, 126 S. Ct. 2749, 2800 (2006) (Kennedy, J., concurring) (citation omitted). In the MCA, Congress purported to authorize what are virtually "law-free" zones even in areas of exclusive U.S. authority and control, where the Executive can unlawfully detain individuals forever without meaningful judicial recourse. In so doing, Congress has upset the delicate balance of power established by the Framers.

The Suspension Clause guarantees in these circumstances what the writ of habeas corpus has always ensured: that an independent court can inquire into the legal and factual bases for the Executive's assertion of its power to imprison. This guarantee has always included a meaningful judicial evaluation of the law and facts that underlie the Executive's asserted basis to detain. Even before their general factfinding authority was expanded in 1867, *see* Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, habeas courts would conduct a search-

ing inquiry into the "jurisdictional fact[s]" upon which the authority of the detaining tribunal rested. *In re Kaine*, 14 F. Cas. 84, 88, 90 (C.C.S.D.N.Y. 1852) (No. 7,598).[5] "At common law, '[w]hile habeas review of a court judgment was limited to the issue of the sentencing court's jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention.'" *St. Cyr*, 533 U.S. at 301 n.14 (citation omitted). Thus, in *Lockington's Case*, Bright (N.P.) 269 (Pa. 1813), a habeas court conducted an independent inquiry into the Executive's factual assertion that the petitioner was an enemy alien. *Cf. Ng Fung Ho* v. *White*, 259 U.S. 276 (1922) (requiring habeas review of facts underlying Executive's deportation jurisdiction).

The habeas guarantee should at least ensure that petitioners receive a meaningful judicial evaluation of their factual and legal claims that they have not been detained lawfully by the Executive, either because they are not "enemy combatants" or for some other reason. Viewed in this light, the Suspension Clause preserves a judicial determination of the Executive's basis to imprison, an issue that does not depend on the existence *vel non* of individual rights.

To hold otherwise would thwart our system of checks and balances. It would allow Congress to authorize, and the Executive to operate, prisons in areas subject to exclusive U.S. authority where no court could ensure that the Executive obeys the law. It would be left to the Executive to determine for itself, without any meaningful judicial check, whether it is following the law. This Nation rightly criticizes other nations when they concentrate such absolute, unchecked power

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[5] *See also Bollman*, 8 U.S. (4 Cranch) at 125-26 (court "fully examined and attentively considered" the "testimony on which [the prisoners] were committed" in lengthy proceedings, finding insufficient evidence of treason); *United States* v. *Hamilton*, 3 U.S. (3 Dall.) 17, 17-18 (1795) (describing examination of evidence about propriety of prisoner's conduct and court's order releasing him on bail); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 986-87 (1998).

in their own executives. Our tripartite separation of powers, guaranteed by the Suspension Clause, ensures that we will not join their ranks. "To demand any less would be to risk concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution." *Hamdan*, 126 S. Ct. at 2780.

This guarantee of judicial review thus safeguards more than just the rights of the individual detained; it ensures the overall "preservation of liberty" entailed in our government of limited and divided power. *Mistretta*, 488 U.S. at 380. As Justice Jackson famously remarked, "[n]o penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring). Yet that is exactly the position of the Government here. Recourse to habeas corpus is required in this case not merely to protect whatever individual rights petitioners may (or may not) possess, but more broadly to ensure that the Executive does not remain beyond the reach of the law.

2. Ensuring Meaningful Judicial Review In These Circumstances Will Promote National Security.

Ensuring this traditional function of habeas for Guantánamo detainees will promote national security as well as liberty. The unconventional nature of the so-called "war on terrorism" and the circumstances of many of the Guantánamo detentions make habeas more, not less, important. Unlike in traditional conflicts, under this Executive's approach to combating terrorism there is no clearly defined enemy, no identifiable battlefield, and no foreseeable end. It appears that only a small minority of the detainees were initially taken into custody by U.S. forces, leaving information about the rest to come from people with multiple unknown motives—including promised bounties—for rendering them into U.S. custody. *See infra* note 20. Meaningful judicial review is thus essential to ensure both that the United States

is holding the right people and that people are not detained indefinitely because they were in the wrong place at the wrong time. By making certain that we are detaining the right people, habeas will promote national security and enable the United States to focus its resources appropriately.

These cases involve individuals detained indefinitely "in territory over which the United States exercises exclusive jurisdiction and control," *Rasul*, 542 U.S. at 476, thousands of miles from any battlefield. While citizens of nations with which we are at war are by definition enemy aliens—and may therefore be detained by the Executive during hostilities, *see, e.g.*, *Ludecke* v. *Watkins*, 335 U.S. 160 (1948)—the Guantánamo detainees are citizens of countries with which we are not at war. In these circumstances, preserving the traditional judicial independence guaranteed by the Suspension Clause will have no adverse impact on any legitimate Executive functions. "[I]t does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here." *Hamdi*, 542 U.S. at 535 (plurality).

While there may be "a realm of political authority over military affairs where the judicial power may not enter," *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring), these cases do not fall within it. This theoretical realm "acknowledges the power of the President as Commander in Chief, and the joint role of the President and the Congress, in the conduct of military affairs." *Id.* In *Rasul*, Justice Kennedy identified *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), as an example of a case that was "not within the proper realm of the judicial power" because the Executive had imprisoned conceded enemy aliens outside the jurisdiction of the United States and because "the existence of jurisdiction would have had a clear harmful effect on the Nation's military affairs." *Id.* Such cases concern "matters within the exclusive province of the Executive, or the Executive and Congress, to determine." *Id.*

There is no need here, however, to determine or opine upon the outer reaches of the judicial power preserved by the Suspension Clause, for these cases are well outside of any theoretical realm of exclusive Executive authority. "A necessary corollary of *Eisentrager* is that there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated." *Id.* at 487. In other words,

> as critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.

Hamdi, 542 U.S. at 530 (plurality).

In *Rasul*, the Court has already held—considering the specific circumstances of the Guantánamo detainees—that preserving the judicial power of habeas corpus in their cases is entirely consistent with the Executive's military role. *See also Hamdi*, 542 U.S. at 535-36 (plurality) (rejecting "the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts" in the enemy combatant setting). These circumstances are factually distinct from the *Eisentrager* prisoners in at least two fundamental ways: "the status of Guantánamo Bay and the indefinite pretrial detention of the detainees." *Rasul*, 542 U.S. at 487, 488 (Kennedy, J., concurring).

First, because "the United States exercises 'complete jurisdiction and control' over the Guantánamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses," *id.* at 480, the Base "is in every practical respect a United States territory, and it is one far removed from any hostilities." *Id.* at 487 (Kennedy, J., concurring). In view of this control, the Court in *Rasul* had no difficulty holding that the habeas statute—unamended in any relevant

respect since the First Congress—authorized petitions by these detainees. While Congress subsequently attempted to define Guantánamo Bay as outside the United States, *see* Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, § 1005(g), 119 Stat. 2739, 2743 (2005), this does not change the basic facts on the ground—the United States retains complete control and jurisdiction. Given *Rasul*'s holding that the judicial power extended to the Guantánamo detainees under a statute drafted by the First Congress to effectuate the Suspension Clause, there can be no credible argument that these cases, brought by the same detainees, are somehow outside the scope of Article III's judicial power.

Second, "the detainees at Guantánamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status." 542 U.S. at 487-88 (Kennedy, J., concurring). To be sure, the detainees now receive limited review by the D.C. Circuit of their status determinations by the Combatant Status Review Tribunal ("CSRT"), but as discussed below, this review provides nothing close to the independent factual and legal review that is the hallmark of habeas. The circumstances surrounding the Guantánamo detentions continue to suggest "a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus" than was present in *Eisentrager*. *Id.* at 488. "In *Eisentrager*, the prisoners were tried and convicted by a military commission of violating the laws of war and were sentenced to prison terms." *Id.* By contrast, many of the Guantánamo detainees were not even taken from a "zone of hostilities," *id.*, making the military necessity for detaining them weak or nonexistent from the outset. Furthermore, many of the detainees have now been held for over five years, and all continue to be "held indefinitely." *Id.* at 487. "[A]s the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker." *Id.* at 488.

In these circumstances, the federal courts "maintain the power and the responsibility to protect persons from unlaw-

ful detention" through the Great Writ. *Id.* at 487. Otherwise, the Executive could preclude the courts from playing "a necessary role in maintaining th[e] delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions." *Hamdi*, 542 U.S. at 536. This "cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government." *Id.* "Striking the proper constitutional balance here is of great importance to the Nation during [a] period of ongoing combat," but "it is equally vital that [the] calculus not give short shrift to the values that this country holds dear." *Id.* at 532.

II. CONGRESS HAS NOT PROVIDED AN ADEQUATE SUBSTITUTE FOR HABEAS REVIEW.

Because there is no contention that Congress has validly suspended habeas corpus at Guantánamo, Congress's preclusion of the writ can only be sustained if it has provided an adequate and effective substitute. *See Swain* v. *Pressley*, 430 U.S. 372, 381 (1977). That it has not done. Congress has authorized review of these detentions only through CSRT determinations, with limited appellate review and no promise of release. These procedures fall far short of the constitutional minimum. They do not permit any meaningful inquiry into the facts; they do not permit the kind of review historically conducted by "superior" habeas courts of "inferior" executive tribunals; and they provide no prospect of judicially-ordered release for improperly detained prisoners.

A. Petitioners Lack Any Meaningful Opportunity To Test The Legality Of Executive Detention.

Under the historic writ of habeas corpus, a petitioner is "entitled to [a] * * * full opportunity for presentation of the relevant facts" related to his detention. *Harris* v. *Nelson*, 394 U.S. 286, 298 (1969). The CSRT procedures—which supply the factual record for D.C. Circuit review under the DTA—allow no meaningful opportunity for a detainee to contest the allegations against him. *Cf. Hamdi*, 542 U.S. at 537 ("Any

process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short.").

Under CSRT procedures, a "Recorder" is supposed to find all "reasonably available" information in the government's possession that bears on a detainee's status and then present that information to the CSRT. CSRT Procedures §§ E(3), H(4) (Enc. 1), C(1) (Enc. 2) (www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf). But it is the Executive that unilaterally determines what information is or is not "reasonably available" at the CSRT. As a result, detainees rarely see more than a handful of unsupported allegations summarized from the classified file and scrubbed of nearly all meaningful content.[6] Of 102 cases reviewed in a recent report, 96% of detainees began their defense without hearing or seeing any facts upon which the Government based its enemy combatant determination other than an unclassified, conclusory summary of the evidence. *See* Mark Denbeaux & Joshua W. Denbeaux, *No-Hearing Hearings—CSRT: The Modern Habeas Corpus?* 25 (2006). By the Government's own admission, such unclassified summaries are "'not persuasive in that [they] provide[] conclusory statements without supporting unclassified evidence.'" *Id.* at 21 (quoting CSRT records) (emphasis omitted).

In fact, classified evidence is often the exclusive basis for the decision that a detainee is an enemy combatant. "In cases

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[6] *See Upholding the Principle of Habeas Corpus for Detainees: Hearing Before the H. Armed Serv. Comm.*, 110th Cong. (July 26, 2007) (testimony of Lt. Col. S. Abraham) (hereinafter "Abraham Testimony") ("[T]he information upon which CSRT decisions were based were vague, generalized, dated, and of little probative value * * *. What our Board received was not only insufficient but evidence to profound lack of credibility as to both the source of the information and the process of review."); *id.* (documents "were heavily redacted * * *. You didn't know where it came from * * * [or] whether it was the product of coercion").

where [detainees] are found to be an enemy combatant, the classified material seals their fate."[7] "[T]he only evidence that the detainees were permitted to offer in the vast majority of the cases was their own testimony" and "the only option available to the detainee was to make a statement attempting to rebut what he could glean from the summary of classified evidence that he could not see." Denbeaux, *supra*, at 6. Critical evidence, such as the names of people who have allegedly incriminated the detainee, or the alleged terrorist group with which the Government claims he is affiliated, was often withheld. For example, one detainee was told that "[a]n al Qaida leader said he knew you at a terrorist training camp." But when the detainee asked who made the allegation, the Tribunal President responded that "[t]he only information we have is that he is a leader. This Tribunal doesn't have his name. It is not available to you in the unclassified." Tr. of Summarized CSRT Testimony ("CSRT Tr."), Detainee #1016, at 1661 (all cited CSRT testimony summaries available at www.dod.mil/pubs/foi/detainees/csrt/).[8] In other cases, unclassified information would name a suspect group but state no link to the detainee. Either the information about the group was included by mistake, or the only link was in the classified information.[9]

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[7] Mark Huband, *Dock of the Bay*, Fin. Times, Dec. 11, 2004, at 16 (quoting unnamed senior CSRT officer); *see* Decl. of T. McPalmer, *Al-Joudi* v. *Bush*, No. 05-301 (D.D.C. filed July 25, 2005) (Unclassified Summary of Basis for CSRT Decision ("Basis for Decision"), Detainee #25, § 5) (unclassified summary did not "contain[] any evidence to support the Government's proposition that the Detainee should be classified as an enemy combatant").

[8] *See also* Decl. of J. Crisfield Jr. ("Crisfield Decl."), *Awad* v. *Bush*, No. 04-CV-1194 (D.D.C. filed Oct. 12, 2004) (Basis for Decision, Detainee #564, §2) (Tribunal noted that it had to rely on classified information for name of the organization with which detainee was allegedly associated).

[9] *See* Crisfield Decl., *Al Azmi* v. *United States*, No. 02-CV-0828 (D.D.C. filed Sept. 24, 2004) (Basis for Decision, Detainee

Although CSRT regulations provide that the detainee can rebut presumptions about this type of government evidence, in reality the opportunity is virtually nonexistent. The detainee can request witnesses and documentary evidence on his behalf through his non-lawyer Personal Representative. But the Tribunal determines in its discretion whether or not the requested witnesses or documents are relevant and reasonably available. *See* CSRT Procedures §§ G(9)-(10) (Enc. 1). In practice, it appears that the Tribunal has rejected all witness requests by detainees, except when they sought to call other detainees, who themselves are likely to lack credibility with the Tribunal. Denbeaux, *supra*, at 28-29.

When a detainee requested that certain witnesses testify, the Tribunal found one "not relevant" and two others "not reasonably available." Summing up the fruitlessness of the process, the detainee responded by asking "How can we get the truth if they are not here?" CSRT Tr., Detainee #975, at 2221. Another transcript tellingly evidences the same futility.[10] In yet another case, a detainee requested that five

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#571, §5.a); Crisfield Decl., *Alawi Mar'i* v. *Bush*, No. 04-CV-1254 (D.D.C. filed Oct. 12, 2004) (Basis for Decision, Detainee #577, §5); Crisfield Decl. at 11-13, *El Banna* v. *Bush*, No. 04-CV-1144 (D.D.C. Oct. 18, 2004) (Basis for Decision, Detainee #905, §5).

[10] "Detainee: [T]hese are accusations that I can't even answer. I am not able to answer them. * * * I don't have proof regarding this. What should be done is you should give me evidence regarding these accusations because I am not able to give you any evidence. I can just tell you no, and that is it. * * *

Detainee: The evidence of proving I was living in Croatia, I do not know how I can get that to you. My wife can send papers or I can talk to the Ambassador about this. Maybe he can send papers that I was living in Croatia.

Tribunal President: You have the opportunity to get that information. I do not know how or what the procedure is, but you really should take the opportunity to get that information.

Detainee: How when I am in GTMO?" CSRT Tr., Detainee

men testify, but the Tribunal found four "not reasonably available." The Tribunal, however, never contacted the men or the government of France (where the men lived).[11] In other instances, the CSRT deemed witnesses unavailable because the United States had not made arrangements with foreign embassies by the time of the hearing. *See* CSRT Tr., Detainee #1000, at 2325; CSRT Tr., Detainee #890, at 2534.

By contrast, the Government's own evidence against the detainees is almost entirely comprised of hearsay. The CSRT can consider any evidence it considers "relevant and helpful," no matter how unreliable. CSRT Procedures § G(7) (Enc. 1). As the CSRT's own legal advisor stated about one hearing, "the evidence considered persuasive by the Tribunal is made up almost entirely of hearsay evidence recorded by unidentified individuals with no first-hand knowledge of the events they describe." Crisfield Decl., *Al Kandari* v. *United States*, No. 02-CV-0828 (D.D.C. filed Oct. 22, 2004) (Legal Suf. Rev., Detainee #552, §1.d). This would even include evidence obtained through torture or other coercion, practices that CSRT subjects allege have been commonplace at Guantánamo.[12] Reported mistreatment includes solitary confinement exceeding one year, sleep deprivation, exposure to extreme temperature, threats of torture, beatings, and other

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#10004, at 3926.

[11] Respondents' Factual Return to Pet. for Writ of Habeas Corpus by Petitioner Ridouane Khalid, *Khalid* v. *Bush*, No. 04-CV-1142 (D.D.C. filed Oct. 18, 2004) (Legal Sufficiency Review of CSRT ("Legal Suf. Rev.") for Detainee #173, §1.d).

[12] A publicly-released government interrogation log reveals that one detainee was interrogated for about 20 hours a day for seven weeks, during which time he was isolated, intimidated with military dogs, sexually humiliated, and subjected to sleep and sensory deprivation. Dep't of Def., *Interrogation Log: Detainee 063* at 27 (www.ifa.hawaii.edu/faculty/jewitt/interrogation.pdf). *See also* CSRT Trs., Detainee #661, at 1045, Detainee #109, at 3793, Detainee #522, at 3954, 3957, Detainee # 332, at 3378-80, 3385.

harsh physical treatment such as short-shackling, sexual harassment and abuse, and religious harassment and abuse.[13] The International Committee of the Red Cross has bluntly characterized the treatment of Guantánamo detainees as "tantamount to torture." Neal A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. Times, Nov. 30, 2004, at A1. According to the Government, however, it is not the CSRT's role to investigate allegations of torture, and a CSRT could consider evidence obtained through torture if deemed reliable. Tr. of Oral Arg. at 84-85, *Boumediene* v. *Bush*, No. 04-1166 (D.D.C. Dec. 2, 2004).

In sum, the procedural guarantees for these proceedings are so minimal as to be effectively meaningless. As a study of 393 CSRT transcripts revealed, the Government did not produce a single witness during any proceeding; all requests by detainees to present witnesses other than fellow detainees were denied; detainees were presented only with a "summary" of classified evidence, which in every instance was so conclusory as to preclude any rebuttal; the tribunal found in every case that the Government's classified evidence was reliable and valid; no counsel were allowed at hearings; and in most cases, the detainee's non-lawyer "personal representative" met with the detainee only once, for no more than 90 minutes including time for translation, only a week before the hearing. Denbeaux, *supra*, at 2-6.

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[13] Mem. from W. Haynes to D. Rumsfeld (Dec. 2, 2002) (www.washingtonpost.com/wp-srv/nation/documents/dodmemos.pdf); Mem. from D. Rumsfeld to Commander USSOUTHCOM (Jan. 15, 2003) (www.washingtonpost.com/wp-srv/nation/documents/011503rumsfeld.pdf); Mem. from D. Rumsfeld to Commander USSOUTHCOM (Apr. 16, 2003) (www.washingtonpost.com/wp-srv/nation/documents/041603 rumsfeld.pdf); Letter from T.J. Harrington to Major Gen. D. Ryder (July 14, 2004) (www.aclu.org/torturefoia/released/FBI_4622_4624.pdf); Physicians for Human Rights, *Break Them Down: Systematic Use of Psychological Torture by U.S. Forces* (2005).

Simply put, the CSRT procedures are not an adequate substitute for the searching factual review guaranteed by habeas corpus. And like the military commission system struck down in *Hamdan*, these procedures "raise concerns" that the CSRT's "decisionmaking may not be neutral." *Hamdan*, 126 S. Ct. at 2807 (Kennedy, J. concurring).[14]

B. DTA Judicial Review Is Inadequate.

The narrow review of the Executive's authority provided by the DTA is inadequate under any construction of the writ of habeas corpus. The guarantee of habeas ensures that petitioners will at least receive a meaningful judicial evaluation of their claims that the Executive lacks legal authority to detain them. Regardless of the merits of their claims or their rights under the Constitution, the detainees at Guantánamo are entitled to an independent judicial determination of the factual and legal issues upon which the Executive's lawful authority depends.

1. Habeas Review Ensures That A Judicial Tribunal Can Meaningfully Review The Legality Of A CSRT's Exercise Of Authority To Detain.

The core purpose of the Great Writ is to ensure that the Executive acts only within its lawful sphere of jurisdiction when detaining individuals. *See Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 203 (1830) (at common law commitment was lawful only if it rested on the judgment of a tribunal acting

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[14] In at least three cases, initial tribunals found that detainees were not enemy combatants, but new tribunals reversed those findings. *Id.* at 3, 37. *See also* Decl. of Lt. Col. S. Abraham ("Abraham Decl.") ¶¶ 22, 23, App. to Reply to Opp. to Pet. for Reh'g, *Al-Odah* v. *United States*, No. 06-1196 (S. Ct., filed June 22, 2007); Abraham Testimony, *supra* note 6 ("When we found no evidence to support an enemy-combatant determination, we were told to leave the hearing open. When we unanimously held the detainee not to be an enemy-combatant, we were told to reconsider. And ultimately, when we did not alter our course * * * a new panel was selected that reached a different result.").

within its jurisdiction). The writ ensured that any "inferior" tribunal of limited authority—such as a police court, court-martial, or other executive body[15]—was subject to the inquiry of a "superior" tribunal, *i.e.*, an independent Article III court, *Watkins*, 28 U.S. at 203, 207. "The judgments or orders of these tribunals of special and limited jurisdiction did not carry the same presumption of validity as the judgments of a superior court." Neuman, *supra* note 5, at 982. Rather, an inferior tribunal's determination of its own authority could be reexamined on habeas, and the Executive was required to expressly demonstrate to the superior court that it had acted within its jurisdiction. *Id.* at 982-83. *See also* Dallin Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 456-57 (1965-66).

Habeas' central role of ensuring that the executive officer or inferior tribunal did not exceed its limited authority to detain was paramount in military matters.[16] In that context, habeas corpus ensured that the Executive did not act outside its limited realm in conducting courts-martial.[17] As the Court held in *In re Grimley*, 137 U.S. 147 (1890), "the civil courts may *in any case* inquire into the jurisdiction of a court-

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[15] *See id.* at 209; *Ex parte Randolph*, 20 F. Cas. 242, 251 (C.C.D. Va. 1833) (Marshall, C.J.); William S. Church, *A Treatise in the Law of Habeas Corpus* 38-43 (1886).

[16] *See, e.g., In re Stupp*, 23 F. Cas. 296, 303 (C.C.S.D.N.Y. 1875) (No. 13,563) (considering "whether the commissioner acquired jurisdiction of the matter, by conforming to the requirements of the treaty and the statute"); *Randolph*, 20 F. Cas. at 251 (considering "whether the person and subject matter are such as to bring the case within the provisions of the act of congress").

[17] *See, e.g., McClaughry* v. *Deming*, 186 U.S. 49, 62 (1902) ("A court-martial is the creature of statute, and * * * must be convened * * * in * * * entire conformity with the provisions of the statute, or else it is without jurisdiction"); *Meade* v. *Deputy Marshal*, 16 F. Cas. 1291, 1293 (C.C.D. Va. 1815) (No. 9,372) (examining appointment of court-martial and legality of its procedures).

martial, and if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence. * * * *The single inquiry, the test, is jurisdiction.*" *Id.* at 150 (emphases added). Thus, in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the Court granted habeas corpus to prevent a civilian from being tried by military commission where the commission lacked legal authority to do so.[18]

Because this jurisdictional inquiry allowed the habeas court to examine "all issues relating to the legality of the detention," *St. Cyr*, 533 U.S. at 301 n.14 (quotation omitted), habeas ensured that the independent Judiciary could always restrict the Executive to its limited, lawful realm. Habeas thus serves not merely to enforce individual rights, but also to enforce the separation between the Executive and Judicial branches. As noted in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality), although the Executive's Article II power over military trials and the Judiciary's Article III power do not overlap, "this Court has been alert to ensure that Congress does not exceed the constitutional bounds and bring within the jurisdiction of the military courts matters beyond that jurisdiction, and properly within the realm of 'judicial power.'" *Id.* at 66 n.17 (plurality) (quoting U.S. Const. art. III). And as in *Northern Pipeline*, enforcing that guarantee does not require proof that the affected party possesses individual legal rights. There, the Court held that Congress cannot authorize non-Article III

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[18] *See also Wise* v. *Withers*, 7 U.S. (3 Cranch) 331 (1806) (court-martial lacked power to punish justice of the peace where federal law exempted him from militia duty); *Yamashita*, 327 U.S. at 8 ("Congress conferred on the courts no power to review [the] determinations [of military tribunals] save only as it has granted judicial power 'to grant writs of habeas corpus for the purpose of an inquiry into the cause of the restraint of liberty.' The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner.") (citation omitted); *Lee* v. *Madigan*, 358 U.S. 228 (1959) (court-martial lacked power to try defendant for crime committed "in time of peace").

courts to exercise judicial power over common law claims, even though the party prevailing on that separation-of-powers argument denied the validity of the merits of the underlying common law claim. Here, too, petitioners can enforce the structural guarantee of the Suspension Clause without proving in advance the merits of their underlying claims of unlawful imprisonment. Those are matters for the habeas court, not this Court, to decide in the first instance.

2. DTA Review Is Not An Adequate Substitute For The Review Available Under Habeas Corpus.

The DTA permits the D.C. Circuit to review only (1) whether the CSRT's determination was consistent with Defense Department procedures, and (2) "whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States" as applicable. DTA § 1005(e)(2)(C)(ii). This limited review is insufficient because it does not permit the D.C. Circuit to consider the fundamental question whether there is a factual and legal basis to support the detention—the searching review of "inferior" executive tribunals historically conducted by "superior" courts on habeas corpus.

The D.C. Circuit recently rejected the Executive's assertion that that court could only review (with deference) the Record of Proceedings as compiled by the Recorder. *Bismullah* v. *Gates*, __ F.3d __, 2007 WL 2067938 at *6 (D.C. Cir. 2007). Yet, the court's review is still predicated on whatever "Government Information" is collected by the Executive. *Id.* This review does not pass constitutional muster because it does not permit a thorough review of the legal sufficiency of the inferior tribunal's enemy combatant determination.[19]

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[19] For similar reasons, the Government's understanding of what review is provided under the DTA also does not pass constitutional muster. The Government contends that the DTA review should be predicated on the subset of the evidence collected by the Recorder that was presented to the CSRT—an even narrower body of evidence than the D.C. Circuit decided it could review.

As shown above, the "Government Information"—let alone the subset CSRT record—is necessarily incomplete. It was compiled without affording detainees a meaningful opportunity to rebut the allegations against them. The detainees were prohibited from supplementing even the CSRT record with evidence of innocence or evidence that incriminating statements were obtained through torture or monetary inducements,[20] all of which is crucial in enabling the detainee to rebut the presumption of the CSRT rules that evidence is correct and accurate. As a result, there is simply insufficient evidence for the D.C. Circuit to make the critical determination about whether lawful authority to detain exists.

This limited review also cannot cure the defects caused by the use of unrebuttable secret evidence based on hearsay, coerced confessions, and self-interested captors. Because the D.C. Circuit, even on its own view of the scope of review, cannot constrain the Government's determination of what information is reasonably available, judicial review cannot cure the one-sided evidence gathering. Absent the ability to test the veracity of the allegations and the circumstances through which certain information was obtained and to produce evidence in defense, the review is necessarily inadequate.

Decisions that witnesses or documents were not reasonably available or that evidence was not relevant also cannot be cured by a review of the Government Information as defined by the D.C. Circuit in *Bismullah*. For example, the

[20] According to a review of 102 cases, only 5% of detainees were captured by United States forces, and 86% were arrested by either Pakistan or the Northern Alliance and turned over to U.S. custody during a time when the United States offered large bounties for such prisoners. Mark Denbeaux, *et al.*, *Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data* 2-3 (2006). Executive officials concede that many Guantánamo detainees came into U.S. custody because they "had been kidnapped by Afghan warlords and sold for the bounty the U.S. was offering." Nancy Gibbs & Vivica Novak, *Inside "The Wire,"* Time, Dec. 8, 2003, at 40.

Executive could prevent review of potentially exculpatory information by both detainees' counsel and the court simply by claiming the information is not "reasonably available."[21] This would also create a potential loophole that could allow the government to shield information gained through torture and other illegal interrogation techniques.

Moreover, the recent *Bismullah* ruling gives the Executive the discretion to withhold any information it unilaterally deems "highly sensitive." While the information must be provided to the court on an ex parte basis, it is not provided either to the detainee or his counsel and thus is not subject to an adversary process that ensures a full exploration of all relevant facts. That one-sided process is inconsistent with the searching judicial review required by the guarantee of habeas.

C. There Is No Effective Remedy.

The core of the historical writ of habeas corpus is the power of the court to release exonerated prisoners and thereby provide an effective remedy for detention. Indeed, that was traditionally the *only* remedy available in habeas. *See Bollman*, 8 U.S. (4 Cranch) at 136 (habeas court that finds imprisonment unjustified "can only direct [the prisoner] to be discharged"). Providing this effective remedy for unlawful detention is integral to the traditional understandings of the writ. But the DTA does not provide for release if a detainee prevails in his challenge either of his detention or of his enemy combatant status determination. *See* DTA § 1005(e)(2). Indeed, there are numerous detainees whom the Government *itself* has declared no longer to be enemy

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[21] *See* Abraham Testimony, *supra* note 6 (Abraham was "denied the ability to review relevant information or confirm the existence of exculpatory evidence." "The record that was placed before the court—as are the records and cases of every single detainee, do[es] not contain all of the information that was reasonably available. The process was never calculated to allow for, or accommodate, all of the information that was immediately or even reasonably available."); Abraham Decl., *supra*, at ¶¶ 11-15.

combatants but has continued to detain for years. Thus, the DTA's failure to expressly authorize a court to discharge a prisoner whose detention is invalid renders it an inadequate substitute for the guarantee of habeas corpus.

The government argues that the clear lack of a statutory remedy for an unlawful executive determination is of no consequence because the court may order a remand for new CSRT proceedings if it determines that the Tribunal made an error of law or failed to consider certain evidence. But a remand to the same Executive agency for an additional consideration of evidence or correction of a legal error under the current CSRT regime cannot possibly cure the established and fundamental inadequacies of those very proceedings. Moreover, nothing prevents the Executive from conducting CSRT reviews seriatim until it reaches the result it wants. Remand cannot substitute for the judicially ordered release available through habeas corpus. Instead, it permits the unlawful detentions to continue indefinitely. This is precisely what the Great Writ is designed to foreclose.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed.

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